Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1793

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Appellee.

On Appeal From the Missouri Court of Appeals,
Kansas City District

JURISDICTIONAL STATEMENT

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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. _____

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Appellee.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

Notice is given that Appellants appeal from the judgment entered on the second issue by the Circuit Court of Jackson County, Missouri. The Circuit Court granted summary judgment on April 3, 1974, for defendant appellee hospital on two issues, the first dealing with the admissability of affidavits as evidence, the second dealing with the Missouri Statute of Limitations, Section 516.140, R.S.Mo. (1969) as a bar to the action. Appellants' Motion to Amend the Judgment and/or for New Trial was overruled May 30, 1974. The Missouri Court of Appeals, Kansas City District, reversed and remanded the first issue on December 8, 1975, but did not rule on the second. Appellants' Motion for Rehearing by the Court of Appeals of the second issue or, in the alternative, application for transfer of the second issue to the Missouri Supreme Court, was denied January 12, 1976.

OPINIONS BELOW

The opinions of the Circuit Court of Jackson County, Missouri, and the Missouri Court of Appeals, Kansas City District, are set forth in Appendix A to this statement.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1257(2). Cases which sustain the jurisdiction of this Court include *Dohnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Fiske* v. *Kansas*, 274 U.S. 380 (1927); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U.S. 313 (1930); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930); *Railway Express Agency* v. *Virginia*, 336 U.S. 106 (1949); *Lathrop* v. *Donahue*, 367 U.S. 106 (1961). Alternatively, should this Court determine that an appeal does not lie under 28 U.S.C.A. 1257(2), Appellants respectfully move this Court to treat this Jurisdictional Statement as a Petition for Certiorari. 28 U.S.C.A. 2101(c).

QUESTION PRESENTED BY THIS APPEAL

The question presented by this appeal is as follows:

Whether the Missouri limitation of action statute, Section 516.140, R.S.Mo. (1969) is in violation of the due process clause of the United States Constitution, the Fourteenth Amendment, in that those victims of medical malpractice who do not discover their injuries within the prescribed two-year period are deprived of a right to be heard.

STATE STATUTORY PROVISION INVOLVED

Section 516.140, R.S.Mo. (1969) which provides in part:

> "all actions against . . . hospital . . . for damages for malpractice, error, or mistake, shall be brought within two years from date of the act of neglect complained of. . . ."

STATEMENT

This appeal stems from an action brought by Appellants in the Circuit Court of Jackson County, Missouri to recover damages from defendant-appellee hospital for negligently giving to appellant, Maxine Allen, a contaminated blood transfusion from which she contracted infectious serum hepatitis. On or about May 8, 1971, appellant Maxine Allen was admitted as a patient to defendant-appellee hospital for back surgery. In the course of and/or following surgery, it was determined by appellant's doctor that she needed blood transfusions which were administered to her in the hospital.

Transfusion services were performed upon appellant on May 22, 1971, by said hospital, which latter factor is not disputed by the parties. Following her discharge from the hospital on or about June 12, 1971, appellant did not become aware of having contracted infectious serum hepatitis as a result of said blood transfusion services until on or between August 25, 1971, and September 17, 1971 (Tr. 9, 10, 11), after and during which time she immediately sought treatment for same. Appellants' petition was filed on May 23, 1973.

The Circuit Court of Jackson County, Missouri, rendered summary judgment in favor of defendant-

appellee hospital, but the Missouri Court of Appeals, Kansas City District, reversed this judgment as to the issue dealing with the admissability of affidavits into evidence. As a result, appellant was unable to litigate because the trial court held that the Missouri Statute of Limitations, Sec. 516.140, Revised Statutes of Missouri (1969) barred the action. A timely Motion for Rehearing and for Transfer to the Supreme Court of Missouri was made to the Missouri Appeals Court, Kansas City District, and was denied on January 12, 1976.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented is substantial and of broad public importance. It involves the fundamental guarantee of due process as provided by the Fourteenth Amendment to the United States Constitution and touches upon the rights of litigants everywhere.

The question involves the application of a Missouri state statute which, as applied to these appellants, deprives them of their constitutional right of due process under the Fourteenth Amendment to the United States Constitution. According to the ruling of *Fiske* v. *Kansas, supra,* this Court has jurisdiction to hear this appeal.

Alternatively, appellant respectfully requests that this Court consider the matter as a Petition for Writ of Certiorari, should the Court decide an appeal does not lie. 28 U.S.C.A. 1257(2).

It Is a Violation of Appellants' Rights Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution to Dismiss Their Appeal When Notice and Opportunity to Be Heard Was Barred by the Missouri State Statute.

To hold Appellants accountable for filing their action within a two-year period from the date of the negligent act as required in Section 516.140, when it has been demonstrated that they had no knowledge of the negligent act or its injurious results until following the date of its commission, is a gross travesty of justice definitely contrary to legislative intent and causes Section 516.140 to be unfair and unconstitutional in its application. U.S.C.A. Constitutional Amendment 14.

Every citizen is guaranteed certain rights by the United States Constitution. In *Ex Parte Commonwealth of Virginia,* 100 U.S. 339, the Court granted review of a state statute which allowed a trial by jury for a criminal proceeding, but which did not regulate and enforce the means of selecting jurors so that they would include all races. The appellants were two black men, convicted by an all-white jury. The Court granted writ of mandamus to study the statute and decide if it allowed a deprivation of due process. The Court sought to eradicate any discriminatory tactics promulgated by the said state statute.

In the present case discrimination is obviously allowed by the Missouri statute in that it does not affect alike all medical malpractice actions brought by any and all persons. The appellant did not and could not have been aware of the fact that she had contracted hepatitis until approximately four months following the blood transfusion. To permit this two-year limitation

statute to preclude her right for redress is discriminatory. The statutory provision does not allot two years to everyone, but only to those who have immediate knowledge of the wrong done to them. Lack of knowledge robs the unsuspecting injured of part or all of the two-year time period.

To permit this statute to exist as constitutional does a serious injustice to those residents of the State of Missouri and other states which have a like statute, who have become the unwitting victims of an act of malpractice. The very existence of such a law becomes of general interest and urgency to all citizens, thereby creating an urgency for this court to re-examine this particular statutory section.

The true test in determining when a cause of action accrues or arises is to establish the time when the plaintiff could have first maintained the action to a successful conclusion. 51 Am. Jur. 2d, *Limitation of Actions*, Sec. 107. Appellant plainly could not maintain an action until she had knowledge of her injuries. To disallow her bringing action is unjust and unconstitutional.

In addition, Section 516.140 is class legislation in that it applies only to those who have knowledge within the allotted time, and is discriminatory to those who do not have such knowledge. The statute fails to affect alike or equally all persons having causes of action within those classes.

This Court has pointed out that each individual case must be studied to determine whether there is some ground of difference that rationally explains the different treatment accorded different people. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920).

A rational explanation for different treatment of one corporation could not be found where that corporation was taxed according to state statute in a manner unlike that for other corporations. The Court reviewed the statute and found it to be violative of the equal protection and due process clauses of the United States Constitution. *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78 (1907).

In *Barber* v. *Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1884), where a state statute did not allow wash houses in certain areas of the city of San Francisco, the Court reviewed the statute and said, "Class legislation, discriminating against some and favoring others, is prohibited by the Fourteenth Amendment."

Expanding on this idea, the Court added in *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) that "a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." In this case the Court granted an appeal to study an Idaho statute which provided that as between persons equally qualified to administer estates, males must be preferred to females. The Court found this to be based solely on discrimination and violative of the due process clause.

Again the Court granted appeal in *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) and said that a Massachusetts law allowing for the dispersal of contraceptives to married persons only provided dissimilar treatment to married and unmarried people and therefore violated due process.

Any arbitrary discrimination against a certain class such as is present in the instant case is discriminatory and violative of the Due Process Clause of the Fourteenth Amendment.

Due Process requires a hearing before a deprivation of a right or property is allowed. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406. (Distinguishable in that it involves physical seizure of property.) "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale*, 1 Wall. 223.

This right to be heard insures fair play to the individual and protects his use and possession of property from arbitrary encroachment, minimizing unfair or mistaken deprivations of property. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538.

"The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State will listen to what he has to say, substantially unfair and simply mistaken deprivation of property interests can be prevented." *Fuentes* v. *Shevin*, 407 U.S. 67. (Distinguishable because it deals with the physical seizure of property without a hearing.)

In conclusion, the Question presented is so substantial as to require plenary consideration, with brief on the merits and oral argument, for its resolution.

CONCLUSION

For the reason stated, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF MISSOURI,
SIXTEENTH JUDICIAL CIRCUIT

No. 769562
Division One

MAXINE ALLEN, and WILLIAM S. ALLEN,
Plaintiffs,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Defendant.

ORDER AND JUDGMENT

The above entitled cause came before the Court on defendant's motion for summary judgment and the Court, having considered the pleadings, affidavits and defendant's records of plaintiffs' admission as a patient and the parties' suggestions in support of and in opposition to defendant's motion is of the opinion that defendant's motion for summary judgment should be sustained.

The facts necessary to the determination of this motion appear to be the following:

1. That plaintiffs' claims for damages are based on alleged negligence by defendant in its selection and transfusion of blood required by plaintiff Maxine Allen in the course of surgery performed on plaintiff Maxine Allen while she was a patient in defendant hospital between May 18, 1971 and June 12, 1971.

2. That defendant did select and administer blood to plaintiff Maxine Allen by transfusion for the purpose of surgery performed on her while she was a patient in defendant hospital between May 18, 1971 and June 12, 1971.

3. That defendant selected and administered blood to plaintiff Maxine Allen by transfusion on two occasions on or before May 22, 1971.

4. That defendant did not select and administer blood to plaintiff Maxine Allen by transfusion and plaintiff Maxine Allen did not receive any other or further blood transfusions by or from defendant on or after May 23, 1971 while she was a patient in defendant hospital, as aforesaid.

5. That plaintiffs' suit herein was filed May 23, 1973.

On this showing defendant has established that plaintiffs' cause of action is barred by Section 516.140 R. S. Mo. 1969 and that plaintiffs have no cause of action. Such showing has not been successfully controverted by plaintiffs.

WHEREFORE, IT IS ORDERED AND ADJUDGED that defendant's motion for summary judgment is hereby sustained and that judgment be entered in favor of defendant and against plaintiffs on Counts I and II of plaintiffs' petition and that costs be taxed against plaintiffs.

/s/ William J. Marsh
Judge

Dated: April 3, 1974

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD 27,780

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Respondent.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
Honorable William J. Marsh, Judge

OPINION

(Filed December 8, 1975)

Before Wasserstrom, P.J., Shangler and Dixon, JJ.

The petition of the plaintiff Maxine Allen alleged that while a patient at the defendant St. Luke's Hospital of Kansas City, the defendant negligently selected and transfused her with contaminated blood, so that she contracted serum hepatitis and suffered damage. Her husband also claimed damage for loss of consortium by a separate count of the petition.

The answer of the defendant was a general denial and a plea of limitations on the contention that the blood was selected and administered to plaintiff on or before May 22, 1971, and that the petition filed on May 23, 1973, was barred by the two year limitation period of §516.140, RSMo 1969. [See, Laughlin v. Forgrave, 432 S.W. 2d 308 (Mo. banc 1968) which governs on the question of hospital malpractice limitations.]

In the course of trial preparation, the defendant under Rule 59.01 requested that plaintiffs admit as true that

a. The blood used in the transfusion referred to in the plaintiffs' petition was selected on or before May 22, 1971 [and]

b. the plaintiff Maxine Allen received the blood by transfusion referred to in plaintiffs' petition on May 22, 1971

to which the plaintiffs responded

a. presumably true although not in peculiar knowledge of plaintiffs

b. two transfusions were received on May 22, 1971, and a transfusion service of some kind was performed on May 24, 1971.

The defendant followed with a motion for summary judgment on the contention that the claims were barred by the two year limitation of §516.140, RSMo 1969. The motion was supported by the request for admissions and the responses made, but also by an affidavit of David Mack, here rescripted:

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

AFFIDAVIT OF DAVID MACK

I, DAVID MACK, Being a duly appointed representative of St. Luke's Hospital of Kansas City and duly sworn upon my oath, state the following:

That Maxine Allen while a patient at St. Luke's Hospital of Kansas City, received two (2) blood transfusions.

That the two (2) blood transfusions were given on May 22, 1971, and that the blood used in these transfusions was selected on or before May 22, 1971.

That Maxine Allen received no further blood transfusions while a patient at St. Luke's Hospital of Kansas City.

That the "transfusion service" referred to by Plaintiffs, Maxine Allen and William S. Allen, in their Answers to Defendant's Request for Admissions, was in fact a blood test and was not a blood transfusion of any kind.

/s/ David Mack
David Mack

The motion for judgment was supported, also, by reference to the pleadings, to the affidavit of Dr. William F. Benson, who attended the plaintiff wife, and to the medical record of the plaintiff wife presented under the affidavit of Tom Hamilton, Medical Records Coordinator for the defendant hospital.

The trial court found that the petition was based on the claim that the defendant hospital was negligent in the selection and transfusion of blood, that the blood was selected and administered to plaintiff on or before May 22, 1971, and none thereafter, and that the suit filed on May 23, 1973, was not brought within two years from the date of the act of neglect charged and thus was barred by the terms of §516.140, RSMo 1969.

A motion for summary judgment is an appropriate method by which to assert limitations in bar of a petition. Gruenewaelder v. Wintermann, 360 S.W. 2d 678 (Mo. 1962). Summary judgment may be rendered only when the pleadings, depositions, and admissions on file,

together with affidavits and any other proof show that there is no genuine issue of material fact and that judgment should issue as a matter of law. Rule 74.04 (c); O'Leary v. McCarty, 492 S.W. 2d 124, 129[6, 7] (Mo. App. 1973). The burden is upon the movant to show this proof by unassailable evidence. Brooks v. Cooksey, 427 S.W. 2d 498, 500[2] (Mo. 1968).

The summary judgment rule allows a movant to meet this burden of proof by means of affidavit, but only if made on personal knowledge and competent testimony. In terms, Rule 74.04(e) requires that

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

On these criteria, the affidavit of David Mack, described by his oath only as "a duly appointed representative of St. Luke's Hospital of Kansas City", but without a declaration of personal knowledge of the facts alleged, was without probative value on a motion for summary judgment. The allegation of the affidavit that "the 'transfusion service' referred to by [plaintiffs] in their Answers to Defendant's Request for Admissions, was in fact a blood test and was not a blood transfusion of any kind" was not competent evidence to dispute the response of the plaintiffs, and should not have been considered by the trial court. F. S. Bowen Electric Co. v. J. D. Hedin Construction Co., 316 F. 2d 362, 364[2] (D.C. Cir. 1963); Mercantile National Bank at Dallas v. Franklin Life Ins. Co., 248 F. 2d 57, 59[1] (5th Cir. 1957).[1] The genuine issue of fact remains: whether the "transfusion service" administered to the plaintiff on May 24, 1971, was, as her response to the admission request of defendant contends, a transfusion of blood. If so, the petition avoids the bar of limitations.

The affidavits of Hamilton, custodian of the medical records of the defendant hospital, and of Dr. William Benson do not otherwise dispel the issue of fact. They suffer from the same deficiency.

The affidavit of Tom Hamilton recites only that as the duly authorized custodian of the medical records of the defendant hospital, he prepared the complete medical record of the plaintiff wife from the date of admission to discharge. This declaration, presumably intended to qualify the medical record appended to the affidavit as a business record [under §490.680, RSMo 1969] on the proof for summary judgment, fails that purpose because there was no showing that the record was made in the regular course of business, among other requirements of the statute. The document was inadmissible as a business record [Conser v. Atchison T. & S. F. Railway Co., 266 S.W. 2d 587, 592[12, 13] (Mo. 1954).

The remaining affidavit in terms alleged:

> I, Dr. William F. Benson, being duly sworn, state and depose as follows:

---

1. Rule 74.04, which governs Missouri practice on summary judgment derives from Rule 56 of the Federal Rules of Civil Procedure. In the absence of local authority on the sufficiency of proof by affidavit under the rule, the Federal decisions on this aspect of that procedure are particularly persuasive on the construction to be accorded the Missouri counterpart. Lynch v. Webb City School District No. 92, 418 S.W. 2d 608, 617[13-15] (Mo. App. 1967).

1. That I was one of the attending physicians for Maxine B. Allen during her treatment at St. Luke's Hospital of Kansas City from May 18, 1971 to June 12, 1971.

2. That Maxine B. Allen, as indicated by her medical record, received two blood transfusions during her treatment at St. Luke's Hospital, both given on or before May 22, 1971.

3. That Maxine B. Allen was given no further blood transfusions while a patient at St. Luke's Hospital from May 18, 1971 to June 12, 1971.

/s/ William F. Benson, M.D.
Dr. William F. Benson

It is evident from the declaration that Dr. Benson was only one of the physicians who attended plaintiff Maxine Allen and that his testimony concerning the transfusions was not on personal knowledge but merely a reference to medical records. An affidavit which relates information gained from other documents relates hearsay, not such facts as would be admissible in evidence, and is not sufficient to support a motion for summary judgment. Rule 74.04(e); Wellhouse v. Tomlinson, 197 F. Supp. 739, 740[2] (S.D. Fla. 1961); Dean Construction Co. v. Simonetta Concrete Construction Corp., 37 F.R.D. 242, 245[2, 3] (S.D. N.Y. 1965).

Divested of the support of these affidavits, the summary judgment is not established as a matter of law by unassailable proof, and should have been denied by the trial court. On review, we accord the party against whom summary judgment was given every favorable intendment of the record. Pagan v. City of Kennett, 427 S.W. 2d 251, 253[1-4] (Mo. App. 1968).

The issue remains whether the transfusion service administered to the plaintiff by the defendant hospital on May 24, 1971, involved the selection and transfusion of blood by the defendant and thus tolled the statute of limitations on the causes of action pleaded by the petition.

The cause is reversed and remanded.

All concur.

Charles Shangler, Judge.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Case No. 769,562
Division One, Docket "A"

MAXINE ALLEN and WILLIAM S. ALLEN,
Plaintiffs,
vs.
ST. LUKE'S HOSPITAL OF KANSAS CITY,
Defendant.

ORDER

Pursuant to mandate filed, it is ordered that the order and judgment of April 3, 1974 sustaining defendant's motion for summary judgment and in favor of defendant and against plaintiffs on Counts I and II of plaintiffs' petition be and hereby is vacated, set aside and for naught held and that this cause be and hereby is reinstated to the active trial docket.

/s/ William J. Marsh
Judge

Dated: March 12, 1976

APPENDIX B

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD 27,780

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Respondent.

MOTION FOR REHEARING ON COURT'S RULING PERTAINING TO THE MATTER OF HOSPITAL MALPRACTICE LIMITATIONS, ONLY, OR IN THE ALTERNATIVE, APPLICATION FOR TRANSFER OF SAID PHASE OF THE WITHIN CAUSE TO THE MISSOURI SUPREME COURT

(Filed December 23, 1975)

Come now the Appellants, pursuant to Rules 84.17 and 83.02 of Missouri Rules of Civil Procedure, and move this Court to grant a rehearing concerning, only, the Court's ruling relative to the question of hospital malpractice limitations in the above cause or, in the alternative, to order a transfer of said phase of the within cause to the Missouri Supreme Court for reason that this Court, in its opinion overlooked and misinterpreted the latent implication contained in a segment of the majority opinion of the Missouri Supreme Court in Laughlin v. Forgrave, 432 S.W. 2d 308, concerning this particular issue.

The portion of the Supreme Court opinion referred to in Laughlin, supra (loc. cit. P. 314, Note 8-9) clearly

inferred that its decision might have been different had plaintiff "demonstrated why, how or in what respect Section 516.140, R.S.Mo. 1969, is unreasonable or discriminatory or wherein it does not affect alike all medical malpractice actions brought by any and all persons against doctors and others within the class of persons designated by the statute." The lack of showing, so mentioned, is present in this, the Allen case, for as the record in the Court below reflects, plaintiff, Mrs. Allen, did not and could not have become aware of the fact that she had contracted hepatitis until approximately four months following the blood transfusion. Therefore, to permit this horrendous two-year limiting statute to abridge and preclude her right for redress clearly demonstrates that she is being discriminated against for the statutory provision does not allot "two years to everyone" but only to those who know of the wrong done to them immediately upon its occurrence—knowledge of the negligent act, at any time thereafter, takes away a part if not all of the two year time period.

Further, and in the alternative, the entire structure and import of the within case is of vital general interest and importance to the future applicability throughout the State of Missouri of the malpractice statute as same now exists; in addition, the holding by this Court in its opinion herein rendered recognizing governing status with regard to this statute as being established by the ruling in Laughlin, supra, creates an urgency that the opinion in Laughlin as applicable to said Section 516.140 in conjunction with the issue and vital point raised in this, the Allen case, gives rise to a need that it be minutely re-examined.

In addition, the incidents of injustice brought about by the harshness of the two year statute which begins to run from the date of the act complained of, irrespective of knowledge, are numerous, to say the least. The discriminatory and unconstitutional nature of this statute must again be called to the attention of this Court, or in the alternative, to the attention of the Missouri Supreme Court, in order that the point not raised in the Laughlin case, namely, that the period of limitation is not two years to all, may bring about a judicious scrutinization of this harsh law in the interests of all those inhabitants of the State of Missouri who are now being affected or will become affected by this said statute.

WHEREFORE, Appellants pray for a rehearing in the instant cause or, in the alternative, that said cause be by this Court transferred to the Supreme Court of Missouri for further review, all for reasons herein set forth.

Respectfully submitted,

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and

John R. Oliver
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Attorneys for Appellants

Copy of the above and foregoing Motion sent to John M. Kilroy and W. James Foland, Shughart,

Thomson & Kilroy, 914 Commerce Bank Building, P. O. Box 13007, Kansas City, Missouri 64199, Attorneys for Respondent, this (23rd) day of December, 1975.

John C. Russell

MISSOURI COURT OF APPEALS
Kansas City District
10th Floor Jackson County Courthouse
Kansas City, Mo. 64106

Mary Louise Thomas, Clerk Area Code 816 881-3787

January 12, 1976

Mr. John C. Russell
10216 E 72nd Street
Raytown, Missouri 64133

In re: Allen, et al v St. Luke's Hospital
KCD 27780

Dear Sir:

The Court has this day overruled Motion for rehearing and Transfer to the Supreme Court is denied in the above cause.

Yours very truly

/s/ M. L. Thomas
Clerk

18.
cc:
Mr. Donald L. Shughart
922 Walnut-Suite 914
Kansas City, Missouri 64106

SUPREME COURT OF THE STATE OF MISSOURI

Cause No.
Court of Appeals No. KCD 27,780
(Kansas City District)

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Respondent.

APPELLANTS' APPLICATION FOR TRANSFER TO SUPREME COURT

Come now the Appellants in the above cause and state that the Missouri Court of Appeals, Kansas City District, filed its Opinion herein December 8, 1975, (copy of first page of said Opinion attached hereto as being the only portion of the said Opinion touching upon the subject matter of this Application for Transfer—a copy of last page of said Opinion is also enclosed to show that all Judges concur) and denied Appellants' Motion for Rehearing or the Alternative to Transfer said cause of action to the Supreme Court on January 12, 1976 (copy attached hereto), and Appellants now move this Court to transfer only that portion of said cause relating to the hospital medical malpractice limitation statute raised in Appellants' Appeal from the Circuit Court to the Supreme Court for further hearing based upon the following reasons:

The Court of Appeals, in its Opinion erred in its consideration of the matter of hosptial malpractice limitations by overlooking or failing to allot due consideration to the factual evidence in the record of the

within cause to the effect that Appellant herein, Mrs. Maxine Allen, did not become aware of her having contracted Hepatitis until approximately four (4) months following the alleged acts of malpractice, namely, the blood transfusions in question.

It has been Appellants' contention throughout this entire cause that the interpretation of Section 516.140 Revised Statutes of Missouri, 1969, set forth in the majority opinion of this Court in Laughlin vs. Forgrave, 432 S.W. 2nd 308, although perhaps correctly interpreting the said statute as written, failed to recognize the unconstitutionality of same. The Kansas City Court of Appeals, in its Opinion rendered with regard to this question in the within cause, followed suit.

Appellants further contend that this Court in the Laughlin case, along with the Kansas City Court of Appeals in this cause, recognized that said Section 516.140 as stated, is a two (2) year application to all persons affected thereby from the date of occurrence of the act complained of; however, in the Laughlin case, supra, the point was not raised with any appreciable degree of thrust—if to any degree whatsoever—that although the two (2) year limitation applies to every unwitting victim of a malpractice act, it is not a two (2) year Statute of Limitation to all but only to those who have timely knowledge of the act having been committed within a given statutory term. Again, it may well be and undoubtedly has been that a realistic operation of the Statute has given various but different periods or segments of the two (2) year span to sundry people within which to file their respective action but obviously always a lesser time than the full two (2) years has been parcelled out to any of such folk by this horrendously unjust law.

Further, to permit this Statute to exist as constitutional does a serious injustice to those residents of the State of Missouri who have become the unwitting victims of an act of malpractice and thus the very existence of such a law becomes of general interest and importance to all of such citizenry, thereby creating an urgency for this Court to reexamine this particular statutory section.

If permitted to stand, this section will continue to impose an irreparably harsh penalty upon those who are not so fortunate to acquire knowledge of a given wrongful act of malpractice until after the two (2) year statute has run. It is further injurious and discriminatory to this particular element of the populace for reasons that their time within which to act during the two (2) year period calls for action, predicated upon awareness, to be taken on their part but within various times and, in some instances, their said time is wholly precluded for a nonculpable lack of knowledge.

In other statutory sections of Missouri law governing libel, slander, assault and battery, false imprisonment, criminal conversation and fraud, the allotted time within which an aggrieved may bring a cause of action under said sections does not commence to run until knowledge of the wrongful act becomes manifest. Yet, in acts of malpractice, we have an inconsistent and diametrically opposite statutory holding which further casts a shadow of discrimination upon those beset with medical malpractice woes as opposed to others affected by libel, slander and the like. In addition, the said Section 516.140 as enacted and permitted to be, is class legislation in that it applies only to those who have knowledge within the time allotted, and, is discriminatory to those who do not so acquire such knowledge and, in its unconstitutional vein, fails to effect alike or all persons having causes of action within those classes.

The heretofore referred to Section 516.140, being grossly and patently unjust, cries out for rectification thus causing it to become incumbent upon this Court to review the within cause, in light of the existence of said Statute and allot to it due and ample consideration for the benefit of all Missourians who have been or will be affected by this particular section.

For purposes of this Application for Transfer, Appellants, in addition to the foregoing, incorporate herein by reference those reasons set forth in their Motion for Rehearing or in the Alternative to Transfer to the Supreme Court of Missouri filed with the Missouri Court of Appeals, Kansas City District and denied on January 12, 1976.

WHEREFORE, Appellants respectfully request that this Court order the within cause transferred to it for further hearing and decision on the matter of hospital malpractice limitations only.

John C. Russell
10216 East 72nd Street
Raytown, Missouri 64133
358-1959

Attorney for Appellants

Copy of the above and foregoing Application for Transfer mailed, postage prepaid, this 26th day of January, 1976, to John M. Kilroy and W. James Foland, Shughart, Thomson & Kilroy, 914 Commerce Bank

Building, P. O. Box 13007, Kansas City, Missouri 64199, Attorneys for Respondent.

John C. Russell

Copy of this Application for Transfer served this 26th day of January, 1976, upon the Clerk, Mary Louise Thomas, Missouri Court of Appeals, Kansas City District.

John C. Russell

No. 59402

KCD 27,780

IN THE SUPREME COURT OF MISSOURI

JANUARY SESSION 1976

Maxine Allen, et al., Appellants,
vs. TRANSFER
St. Luke's Hospital of Kansas City, Missouri,
Respondent.

Now at this day, on consideration of Appellants' Application to transfer the above entitled cause from the Kansas City District, Missouri Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1976, and on the 8th day of March 1976, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 8th day of March 1976.

/s/ Thomas F. Simon, Clerk

By /s/ Mary Elizabeth McHaney, D.C.

(Seal)

APPENDIX C

MISSOURI COURT OF APPEALS

KANSAS CITY DISTRICT

No. KCD 27,780

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,
vs.
ST. LUKE'S HOSPITAL OF KANSAS CITY,
Respondent.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

(Filed May 7, 1976)

Notice is given that Appellants herein appeal from the judgment entered in this action on the 3rd day of April, 1974, by the Circuit Court of Jackson County, Missouri, pertaining to the question of hospital malpractice limitations statute (Motion to Amend and/or For New Trial overruled by said Circuit Court on May 30, 1974), from that portion of the opinion of the Missouri Court of Appeals, Kansas City District, not disturbing said Circuit Court ruling, from the Order of the Missouri Court of Appeals, Kansas City District, on January 12, 1976, overruling Appellants' Motion

for Rehearing and Transfer to the Supreme Court of Missouri on the particular question and the Order of the Supreme Court of Missouri denying Appellants' Application to Transfer on March 8, 1976, all in accordance with Rule 10, Rules of the Supreme Court of the United States.

The parties appealing in this matter are Appellants, Maxine Allen and William S. Allen and they do hereby appeal from that part of the judgment entered in this cause on April 3, 1974, by said Jackson County Circuit Court pertaining to the question of hospital malpractice limitations statute, in addition to the subsequent Orders of the Missouri Court of Appeals, Kansas City District, and the Supreme Court of the State of Missouri, overruling Motions for Rehearing and Transfer, all in accordance with and pursuant to 28 USC 1257(2) and 28 USC 2101(c).

/s/ John C. Russell
John C. Russell
10216 East 72nd Street
Raytown, Missouri 64133
358-1959

and

/s/ John R. Oliver
John R. Oliver
200 Centre Building
7134 West 80th Street
Overland Park, Kansas 66204
Attorneys for Appellants

Dated this 7th day of May, 1976.

Copy of the above and foregoing Notice of Appeal mailed this 7th day of May, 1976, to John M. Kilroy

and W. James Foland, Shughart, Thomson & Kilroy, 914 Commerce Bank Building, P. O. Box 13007, Kansas City, Missouri 64199, Attorneys for Respondent.

/s/ John C. Russell
John C. Russell

JUL 3 1976

In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1793

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Respondent.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

RESPONDENT'S MOTION TO DISMISS THE APPEAL FROM THE SUPREME COURT OF MISSOURI, BRIEF IN SUPPORT, AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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In The

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1793

MAXINE ALLEN and WILLIAM S. ALLEN,
Appellants,

vs.

ST. LUKE'S HOSPITAL OF KANSAS CITY,
Respondent.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

RESPONDENT'S MOTION TO DISMISS THE APPEAL FROM THE SUPREME COURT OF MISSOURI, BRIEF IN SUPPORT, AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

OPINIONS BELOW

Respondent concurs in Appellants' statement of the opinions below.

QUESTION PRESENTED ON APPEAL

There is no question on appeal as there is no judgment or other decision, final or provisional, in the courts below for this court to review. The issue Appellants attempt to raise on appeal should be presented as follows: Is it unconstitutional for the state legisla-

ture to enact a reasonable statute of limitations for tort actions in malpractice.

STATEMENT OF THE CASE

Respondent takes issue with the Appellants' statement of the case and deems it necessary to correct omissions therein.

The Appellants admit that the sole allegation of negligence against Respondent arises from a "transfusion" which occurred on or before May 22, 1971. Appellant, Maxine Allen, alleges that as a result of the transfusion she contracted hepatitis, which condition was discovered no later than September 17, 1971, twenty months prior to the running of the applicable statute of limitations.

The trial court rendered a Summary Judgment in favor of Respondent. Appellants sought a review in the Missouri Court of Appeals, Kansas City District. The Court of Appeals reversed the trial court's decision and remanded the case for a new trial on all issues.

Appellants then filed a Motion for Rehearing and Transfer to the Supreme Court of Missouri which was denied on January 12, 1976. The case was again set for trial in the Circuit Court of Missouri, Sixteenth Judicial Circuit but was continued indefinitely pending the outcome of Appellants' Appeal and/or Petition for Certiorari to this court.

MOTION TO DISMISS THE APPEAL FROM THE SUPREME COURT OF MISSOURI

Pursuant to Rule 16 of the Supreme Court Rules, Respondent files herewith its Motion to Dismiss the Appeal and as grounds therefor, states:

1. Appellants' Jurisdictional Statement fails to show that the federal question raised on appeal was expressly passed on by the court below or that there is any decision on the federal question in the court below.

2. Appellants' Jurisdictional Statement fails to present a substantial federal question.

3. Appellants did not timely or properly raise the claimed federal question in accordance with state law.

4. Appellants' Jurisdictional Statement does not affirmatively set forth the raising of the federal question below.

BRIEF IN SUPPORT OF MOTION TO DISMISS THE APPEAL FROM THE SUPREME COURT OF MISSOURI

I

The Motion to Dismiss the Appeal Should Be Sustained

Appellants' Jurisdictional Statement Fails to Show That the Question Raised on Appeal Was Expressly Passed on by the Court Below or That There Is Any Decision on the Federal Question in the Court Below.

As a new trial on all issues has been granted to Appellants by the Missouri Court of Appeals, this appeal is premature. Appellants admit that the issue raised by them was not ruled upon in their Jurisdictional Statement, at p. 1. No final decision on the constitutionality of Mo. Rev. Stat. Ann., Section 516.140, has as yet been rendered in this case. Without a judgment from the Missouri Court of Appeals, Kansas City District on the question presented by Appellants, Appellants fail to comply with Supreme Court Rule 16 requiring that the question presented be expressly passed on in the court below.

II

Appellants' Jurisdictional Statement Fails to Present a Substantial Federal Question

An appeal on the basis of the application of a limitations statute has never been favored by the Supreme Court. The application of laches or the statute of limitations does not usually present a federal question, e.g. *Wood* v. *Chesborough*, 228 U.S. 672 (1913);

Preston v. *Chicago*, 226 U.S. 447 (1913); *Morgan* v. *Horsky*, 178 U.S. 205 (1900).

In cases involving constitutional attacks on statutes of limitation, the court will defer to the judgment of state legislatures as to the reasonableness of the period allowed. In *Terry* v. *Anderson*, 95 U.S. 628 (1877), a suit to enforce the liability of the stockholders of a bank was barred by a state statute of limitations. The court stated:

> "In all such cases, the question is one of reasonableness, and we have therefore, only to consider whether the time allowed in this statute is, under all circumstances, reasonable. Of that the Legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed." 95 U.S. at 633.

In *Wilson* v. *Iseminger*, 185 U S. 55 (1902) the court added:

> "What shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." 185 U.S. at 63. *Accord*, *Soper* v. *Lawrence Brothers Co.*, 201 U.S. 350 (1906); *Mills* v. *Scott*, 99 U.S. 25 (1879).

The two-year statutory period found in Mo. Rev. Stat. Ann., §516.140, as well as its application in this case, are reasonable. A two-year period in which to bring suit is not so "manifestly . . . insufficient that

the statute becomes a denial of justice." *Wilson* v. *Iseminger, supra.* In *Laughlin* v. *Forgrave,* 432 S.W. 2d 308 (Mo. 1968), the Missouri Supreme Court en banc recognized the legislative intent of the malpractice limitation statute, and held that it violated neither the due process nor equal protection clauses of the United States Constitution or the Constitution of the State of Missouri (1945).

Mo. Rev. Stat. Ann., §516.140 as applied in the instant case does not deny Appellants due process, particularly since Appellant, Maxine Allen, discovered her injury one year and eight months prior to the running of the statute of limitations. Appellants had ample time in which to be heard, preserving their right to fair access to civil courts under the due process clause of the Fourteenth Amendment to the United States Constitution. Further, all litigants in malpractice claims in Missouri are treated alike, in that all have two years from "the date of the act of neglect complained of" in which to initiate suit.

Though Appellants present their case as a denial of due process, the "class legislation" complained of is more properly raised as a Fourteenth Amendment, equal protection argument. Unless a fundamental right is denied by the legislation, or a suspect classification is created, or invidious discrimination results, the proper equal protection standard is a rational basis for the legislation. The equal protection guarantee prohibits arbitrary discrimination, that which is not reasonably related to a legitimate governmental objective. The governmental objective fostered by the statute of limitations, as stated in *Chase Securities Corporation* v. *Donaldson,* 325 U.S. 304, 314, is "to spare the courts from litigation of stale claims, and the citizen from be-

ing put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." A legislative requirement that all medical malpractice suits be brought within two years is a reasonable method by which to meet this objective.

The court properly refused to review a recent First Circuit decision, *Clark* v. *Gulesian,* 429 F.2d 405 (1970), in which an argument similar to that of Appellants was made. In that case, the Maine statute of limitations was raised as a defense to a medical malpractice action. As in Missouri, the Maine limitation period began at the time of the wrongful act. As in *Laughlin* v. *Forgrave, supra,* the *Clark* court held that an application of the applicable statute of limitations was not a denial of due process or equal protection. The Appellants do not raise any new or substantial federal question for review by this court.

III

Appellants Did Not Timely or Properly Raise the Claimed Federal Question in Accordance With State Law

Under Missouri law, issues not raised by a party in his motion for new trial to the trial court are not preserved for appeal; Rule 79.03 Mo. R. Civ. P.; *Samborski* v. *Price,* 417 S.W.2d 205 (Mo. 1967). As Appellants did not raise the federal question they present on appeal in the motion for new trial, the issue was not properly preserved in accordance with the requirements of state law, and this court is without jurisdiction to decide whether constitutional rights have been violated. *Edelman* v. *California,* 344 U.S. 357 (1953); *Saunders* v. *Shaw,* 244 U.S. 317 (1917); *Hulbert* v. *City of Chicago,* 202 U.S. 275 (1906); *Mutual Life Insurance Co.* v. *McGrew,* 188 U.S. 291, 308 (1903).

IV

Appellants' Jurisdictional Statement Does Not Affirmatively Set Forth the Raising of the Federal Question Below

The statute authority upon which Appellants rely for their appeal to the United States Supreme Court, 28 U.S.C. §1257 (2), provides that final judgments of a state's highest court in which decision could be had may be reviewed by the Supreme Court where the validity of a state statute is questioned as being repugnant to the Constitution of the United States, and the decision is in favor of the validity. However, in the jurisdictional statement and accompanying appendix, it is nowhere indicated that Appellants asserted the limitations statute violated the *Federal* Constitution, prior to their phrasing of the question before this court.

The court has frequently held, and Supreme Court Rule 16 (1)(b) requires, that it must affirmatively appear from the record that the federal question was actually presented to the highest court of the state. *See, e.g., Slagle* v. *State of Ohio,* 366 U.S. 259 (1961); *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Wilson* v. *Cook,* 327 U.S. 474 (1946); *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission,* 297 U.S. 471 (1936). Appellants have not shown that the federal question was presented to the Missouri courts for their decision.

ALTERNATELY THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

I

Neither the Supreme Court of Missouri nor the Missouri Court of Appeals, Kansas City District Denied Appellants Any Right Under the Constitution of the United States in Their Decision in This Case nor in Upholding the Validity of Section 516.140 of the Missouri Statutes

Appellants request this court, should their appeal be denied, to treat their brief as a Petition for Writ of Certiorari. The grounds alleged are the same as those supporting their appeal. For all of the reasons set forth in Respondent's Brief in Support of Its Motion to Dismiss the Appeal, Respondent submits that the Appellants have failed to show that any decision of any court of Missouri in this cause presents any question to be settled by the Supreme Court of the United States.

In addition, Respondent states that Section 516.140 of the Missouri Statutes does not deprive Appellants of any rights under the Constitution of the United States. The statute in question has been enacted by the legislature of the state of Missouri. The statute's constitutionality has been questioned in the courts of the state of Missouri, and it has been found to be constitutional; *Laughlin* v. *Forgrave,* 432 S.W.2d 308 (Mo. 1968). As stated by the court in *Laughlin, supra,* "Our function is to interpret the law; it is not to disregard the law as written by the general assembly."

CONCLUSION

For the reasons stated, the Motion to Dismiss the Appeal should be sustained and the petition for a Writ of Certiorari denied.

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